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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

HUGH MILLER MERCER, et al.,
Appellants,
vs.
ARTHUR I. HEMMINGS, et al.,
Appellees.

406
No. _____

HERMAN W. BEVIS, et al.,
Appellants,
vs.
MARK W. EASTLAND, et al.,
Appellees.

No. _____

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS

Chester Bedell,
1520 Barnett Bank Building,
Jacksonville, Florida 32202,
Counsel for Appellees.



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MOTION TO DISMISS

The appellees move the Court to dismiss the appeal in each of the above-entitled cases on the ground that it does not present a substantial federal question.

Statement of the Case

The partners of "Price Waterhouse & Co." a "national" firm of certified public accountants holding certificates from States other than Florida, desire to practice in Florida under

their trade name "Price Waterhouse & Co." without each of the partners first obtaining a Florida certificate as required by Section 473.16, Florida Statutes. They propose to carry on this Florida practice under their trade name through the agency of one or more resident CPA's certified by Florida.

Not denying Florida's police power generally to regulate the practice of public accounting and specifically to grant its certificate only to bona fide residents of Florida meeting Florida's high educational standards, appellants contend that the several provisions of the United States Constitution relied on exempt them from fulfilling the requirements of the Florida Statutes, i.e., that each of the individual partners of "Price Waterhouse" is accorded the federal constitutional right to practice public accounting in Florida through the agency of a partner or employee residing in and certificated by Florida and carrying on appellants' business in Florida under the name "Price Waterhouse & Co.".

Until sometime in 1962 "Price Waterhouse" obtained "temporary certificates" from the State Board pursuant to Section 473.14, Florida Statutes. That section authorizes the issuance of "temporary certificates" to CPA's of other States to enable the holders "to fulfill specific engagements or employments, the contracts for which were entered into beyond the limits of the State" and provides that no such temporary certificate shall be valid for more than ninety days or cover more than one employment.

In 1960 the partners of Price Waterhouse & Co. surreptitiously established an office in Miami staffed by a resident manager and several resident assistants, none of whom held Florida CPA certificates. In January of 1962 the partners of Price Waterhouse & Co. established an additional office in Tampa, similarly staffed (Appellants' Appendix A, pp. 28a and 29a).

In June, 1962, appellants Bevis and Rankin, domiciled in New York, and appellant Mercer, domiciled in Atlanta, partners of Price Waterhouse, and Mr. Daly, then full-time manager of the Price Waterhouse Miami office, entered into a partnership agreement and thereafter published notice under the Florida fictitious name statute of their intention to engage in business in Miami, Dade County, Florida, under the name "Price Waterhouse & Co." The partnership agreement recited that "Price Waterhouse & Co.," a co-partnership "with its principal office located in the City of New York," had consented to the use of that name (Exhibits 3 and 4 to Daly's deposition, Exhibit 9).

Appellants Bevis, Rankin and Mercer had no intention of becoming residents of and personally practicing public accounting in Florida; they intended instead that Daly or some other resident partner or agent would carry on the firm business in Florida under the name of "Price Waterhouse & Co."

The State Board became aware of this "situation" in July of 1962 when Mr. Daly applied for a Florida certificate by reciprocity, representing that his continuous employment by Price Waterhouse in Florida "constitutes full time employment with a certified public accountant" for two years "as required under Sections 473.19 and 473.01 of the Florida Accountancy Law" (Appellants' Appendix A, pp. 29a-30a; Exhibit 1 to Daly's deposition, Exhibit 9). The State Board thereafter amended its Rule governing "temporary certificates" (Rule 20-9.03) to make clear that CPA's certified by States other than Florida are not entitled by Section 473.14, Florida Statutes, to receive temporary certificates for the purpose of establishing and maintaining a full-time practice of public accounting in Florida, as distinguished from the purpose of fulfilling specific engagements (Appellants' Appendix B, p. 60a).

The partners of Price Waterhouse & Co. thereupon instituted the action now styled *Mercer v. Hemmings*, contending, among other things, that they could not lawfully

> "... be required to have Florida licenses as certified public accountants in order to maintain offices [in Florida], staffed by full-time employees, in which to perform their accounting services, ..."
>
> Appellants' Appendix A, p. 32a,

and that

> "... the plaintiff partners have had and now have the constitutional and legal right to continue to engage in the occupation and business of accountancy in the State of Florida and the constitutional and legal right to continue to render accounting services in this state to or for any and all corporations, firms and individuals by which or by whom they have been or shall be employed to render such services."
>
> Appellants' Appendix A, p. 34a.

Consistent with the Board's Rule 20-9.03, the Supreme Court of Florida held that such temporary certificates did not accord Price Waterhouse "the privilege of engaging on a year-round basis, through permanent offices staffed by full-time employees residing in this state, in the practice of accountancy, as certified public accountants, in this state" (Opinion of the Supreme Court of Florida, July 29, 1964, Appellants' Appendix A, p. 34a). The Florida Court held that in order to so practice in Florida the Price Waterhouse partners would be obliged to first obtain Florida certificates by examination or by reciprocity.

Notwithstanding the decisions of the Florida courts complained of here, the partners of Price Waterhouse & Co., still

uncertificated by Florida, continue to engage in a year-round practice through their offices in Florida, staffed by full-time residents of Florida.

Question Presented

The question presented, therefore, is not whether Florida may consistently with the Constitution require certified public accountants to be licensed by Florida before practicing public accounting in Florida, nor yet whether Florida's requirements for certification are valid, but

Whether the United States Constitution requires that Florida except from the operation of its laws non-resident public accountants, certified by other States but not by Florida, who desire to practice in Florida under a fictitious trade name through a partnership or other agency relationship with a resident public accountant certified by Florida.

Argument

The "heart" of what appellants choose to call the "restrictive regulatory scheme" is found in Sections 473.16 and 473.23, Florida Statutes (Appellants' Jurisdictional Statement, p. 6). These provisions make it unlawful for a Florida CPA to practice as a representative, agent, manager or partner of anyone not licensed by the State Board.

These same provisions were challenged in *Morgan* v. *Oosterhoudt* (Fla., 1957), 96 So.2d 139, and sustained. Upon appeal to this Court the appeal was "dismissed for want of a substantial federal question." *Oosterhoudt* v. *Morgan*, 355 U. S. 603.

We submit that these appeals should likewise be dismissed for want of a substantial federal question.

It seems undebatable -- and it is not debated by appellants -- that Florida and all other States may constitutionally require local certification as a condition to the practice locally of public accounting.

It seems likewise undebatable that Florida may constitutionally require, as it does, that an applicant for certification be a bona fide resident of Florida at the time of his application. Many of the States have a comparable provision in their laws regulating the practice of public accounting (see "Provisions in Cpa Laws and Regulations," U. S. Government Printing Office: 1963 O-695-254; and C.C.H. Accountancy Law Reporter). Such provisions represent a wholly justifiable exercise of the police power of the several States. Cf. *LaTourette* v. *McMaster*, 248 U.S. 465, in which this Court sustained South Carolina's requirement that an applicant for an insurance broker's license reside two years in the State.

In their simplest application, Sections 473.16 and 473.23, Florida Statutes, prohibit the non-holder of a Florida certificate from practicing public accounting in Florida through the agency or partnership of a Florida CPA either in the name of the non-holder of a Florida certificate or in the name of the Florida CPA or under some fictitious name such as "Price Waterhouse & Co."

Appellants concede that "a few states," in addition to Florida, "require all partners of a firm to be licensed in a state as a prerequisite to practice." Still not directly attacking the provisions of the Statute so requiring, appellants comment that such other States have made the required licenses "readily available to accountants engaged in interstate practice" (Appellants' Jurisdictional Statement, p. 16) and fall back on the general proposition that the State's police power, sufficient to justify regulation of individuals and small firms,

may not impose the same conditions and restrictions on members of a large "national" firm serving "interstate" clients.

Thus, appellants would make an exception for the six "national" firms so as to permit the members of those firms to practice in Florida through the agency of a resident manager or partner (Appellants' Appendix D, p. 100a). Obviously, legislation making such an exception would discriminate against all other CPA firms and against all individual practitioners, residents and non-residents, who would remain subject to the proscriptions of these Sections of the Florida Statutes.

Numerous State court decisions have held invalid legislation purporting to permit members of a partnership to practice under the license of one of its members while requiring all individual practitioners to be licensed to practice. *Mayor, etc., of City of Vicksburg* v. *Mullane* (1913), 106 Miss. 199, 63 So. 412; *Henry* v. *Campbell* (1910), 133 Ga. 882, 67 S.E. 390, 27 L.R.A.(n.s.) 283; *State* v. *Gardner* (1898), 58 Ohio St. 599, 51 N.E. 136, 41 L.R.A. 689; *Winkler* v. *Benzenberg* (1898), 101 Wis. 172, 76 N.W. 345. In the cited cases, the effect of the unlawful discrimination resulting from such legislation was to invalidate the whole licensing scheme. Should this Court hold that a person not holding a Florida certificate may practice accounting in Florida through the agency of or partnership with a Florida CPA, it seems obvious that the power and responsibility of the State Board to enforce Florida's educational and ethical standards would thereby be completely thwarted.

Florida's prohibition against a firm of accountants practicing as such unless all members of the firm are certified by Florida is justified by the findings and conclusions of the State Board as reported to the Florida Legislature:

(1) that the Florida business community would not be benefited by modifying the provisions of the present law relating to the practice of accountancy by out-of-state accounting firms in Florida; (2) that the present provisions do not result in any real inconvenience to the clients using out-of-state accounting firms, or to such firms serving Florida clients; and (3) that the modifications suggested by the out-of-state National firms would result in the lowering of the accounting standards in Florida and lessening of the public protection presently afforded by the regulation of accounting by the State."

Appellants' Appendix D, pp. 105a-106a.

The 1967 Florida Legislature considered the State Board's report and the recommendation of the six "national" firms that they be exempted from the requirements of Section 473.16, Florida Statutes, and decided to continue to limit the practice of accounting to firms in which all members are certified by the State of Florida. This policy decision of the Florida Legislature is within the police power of the State and "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation" for "courts do not substitute their social or economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U. S. 726, 729-730; *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U. S. 35, 47.

Appellants' managing partner testified that he favors "Federal accreditation" (Exhibit 14, p. 23, and Exhibit 13, p. 4). Consistent with this tenet, appellants assert that "the practice of accountancy . . . is national in scope and cannot be fragmented" (Appellants' Jurisdictional Statement, p. 16) and that "National accounting firms such as Price Waterhouse

must operate across state boundaries" (Id., p. 17) and conclude that Florida's "exclusionary regulation" (Id., p. 27) amounts to a "balkanization of the profession" (Id., p. 17) that cannot be "tolerated in our federal regime" (Id., p. 27).

These arguments would be better addressed to the national Congress. Should the Congress provide for federal licensing of certified public accountants serving "interstate clients," it is clear that Florida could not require Florida certification as a condition to practicing in Florida under the federal license. *Sperry* v. *Florida*, 373 U.S. 379. However, until Congress acts in such a way, the States must be free under their police power to regulate the local practice of accountancy in the manner that, in their judgment, best serves the public interest.

Conclusion

The appeals should be dismissed for want of a substantial federal question.

Respectfully submitted,

(Chester Bedell)
1520 Barnett Bank Building
Jacksonville, Florida 32202,
Counsel for Appellees.